

**Before the
FEDERAL TRADE COMMISSION AND ANTITRUST DIVISION
OF THE DEPARTMENT OF JUSTICE
Washington, DC 20580**

In the Matter of

Request for Information on Merger Enforcement

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) **Docket No.**
) **FTC-2022-0003**
) **-0001**
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COMMENTS OF THE NATIONAL HISPANIC MEDIA COALITION

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The National Hispanic Media Coalition (NHMC) respectfully submits these comments in response to the Federal Trade Commission and the Antitrust Division of the Department of Justice’s (“Agencies”) Request for Information on Merger Enforcement, dated January 18, 2022 (“RFI”), seeking public input on “how the agencies can modernize enforcement of antitrust law regarding mergers.”¹ NHMC is a 36-year-old nonprofit organization that advocates for civil rights and eliminating hate, racism, and discrimination against the Latino community. NHMC utilizes education, policy work, and media advocacy to achieve these goals.

¹ *Federal Trade Commission and Antitrust Division of the Department of Justice Request for Information on Merger Enforcement*, FTC-2022-0003-0001, Request for Information (Jan. 18, 2022) (“RFI”).

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I. INTRODUCTION

NHMC believes that promoting diversity is a critical tool for the advancement of Latinx and other historically and intentionally marginalized communities. However, promoting diversity is not simply a means to be inclusive; it also is a means to promote increased market competition and economic growth. As mergers and acquisitions become more prevalent, especially within big tech and the media industries, it is paramount that the Agencies modernize merger enforcement guidelines to acknowledge modern market realities and rectify past discriminatory practices that have hampered, and continue to hamper market competition and innovation in tech and media markets. Therefore, NHMC is pleased to provide comments to the Agencies urging an equitable review and update of merger enforcement guidelines.

On January 18, 2022, the Agencies published the RFI seeking comments on how effectively the current merger guidelines address competitive issues raised by present mergers in today's modern markets.² To ensure the modernization of merger enforcement, the Agencies must acknowledge the modern market realities, such as current national demographics that have been detrimentally overlooked in the past. The Agencies must recognize market presumptions and consider how a lack of diversity—both at the corporate leadership level and throughout labor markets—harms competition and adversely affects consumers. Additionally, with the rise of digital markets, it is urgent to consider and prioritize how diversity impacts the innovation of products and content delivered to consumers.

To ensure an adequate review of proposed mergers and their impacts on competition and consumers, NHMC urges the Agencies to update merger enforcement guidelines with a focus on prioritizing diversity as a metric to bolster market competition and innovation in accordance with the Clayton Act.

² *Id.*

II. A LACK OF DIVERSITY INITIATIVES SUBSTANTIALLY LESSENS COMPETITION IN CONTRADICTION TO THE CLAYTON ACT

The RFI requests commentary concerning whether there are aspects of proposed mergers that are underemphasized or neglected in the current guidelines.³ NHMC believes a lack of diversity considerations in the current merger enforcement guidelines fails to adequately achieve the Clayton Act’s goal of preventing mergers that may substantially lessen competition.

Section 7 of the Clayton Act prohibits mergers that “may be substantially to lessen competition, or to tend to create a monopoly.”⁴ Additionally, merger enforcement guidelines are intended to “(1) reflect current learning about competition based on modern market realities, and (2) faithfully track the statutory text, legislative history, and established case law around merger enforcement.”⁵ However, the current guidelines’ neglect of diversity considerations, specifically in relation to the Latinx community, underemphasize how the lack of diversity in corporate leadership, labor force, content, and community lessens competition in modern markets, and how increased market concentration can only worsen this problem. .

According to the 2020 Census, the Hispanic or Latino population increased by 23 percent since 2010, and now represents 18.7 percent of the U.S. population.⁶ Additionally, there was a 276 percent increase in the multiracial population.⁷ Moreover, the recent *2020 Post-Enumeration Survey Estimation Report* found the initial results of the 2020 Census undercounted non-whites

³ *Id.* at 2.

⁴ 15 U.S.C. §18

⁵ RFI at 1.

⁶ *Race and Ethnicity in the United States:2010 Census and 2020 Census*, U.S. Census Bureau, (Aug.12, 2021) <https://www.census.gov/library/visualizations/interactive/race-and-ethnicity-in-the-united-state-2010-and-2020-census.html>; see also Nicholas Jones, Rachel Marks, Roberto Ramirez & Merarys Rios-Vargas, *Improved Race and Ethnicity Measures Reveal U.S. Population Is Much More Multiracial:2020 Census Illuminates Racial and Ethnic Composition of the Country*, U.S. Census Bureau (Aug. 12, 2021), <https://www.census.gov/library/stories/2021/08/improved-race-ethnicity-measures-reveal-united-states-population-much-more-multiracial.html>.

⁷ *Id.*

in general, but undercounted the Latino population by a margin of 5 percent, demonstrating that an even larger increase in the Latino population had occurred over the last decade than the 23 percent originally recorded.⁸ With the Latino community having over \$1.9 trillion in collective buying power in 2020,⁹ and a projected increase to \$2.6 trillion by 2024,¹⁰ the economic impact, and importance, of Latino businesses and consumers on modern markets can no longer be overlooked.

In addition, the origins of the Agencies' merger guidelines, including the Clayton Act of 1914, were developed during a time where white supremacy, civil rights violations, misogyny, ableism, and discrimination against anyone who was not a white cis-het male was *considered normal* behavior for the government of the United States. This is no longer the case, and the merger guidelines must be updated to consider and rectify that ugly history.

A lack of diversity initiatives and metrics in current merger enforcement guidelines fails to account for these modern market realities, and that lessens competition, especially (but not exclusively) in the burgeoning markets of Latinx producers and consumers. Therefore, to meet the requirements of Section 7 of the Clayton Act to prohibit mergers that substantially lessen competition, the merger enforcement guidelines must be updated to account for the potential adverse impacts a proposed merger may have on provider diversity in modern markets and their consequent responsiveness to consumer diversity.

⁸ Shadie Khubba, Krista Heim & Jinhee Hong, *2020 Post-Enumeration Survey Estimation Report*, U.S. Census Bureau (Mar. 10, 2022), <https://www2.census.gov/programs-surveys/decennial/coverage-measurement/pes/national-census-coverage-estimates-by-demographic-characteristics.pdf>.

⁹ Selig Center for Economy Growth, University of Georgia, *The Multicultural Economy Report* (2021), <https://www.terry.uga.edu/about/selig>; see also J. Merritt Melancon, *Consumer buying power is more diverse than ever*, UGA Today (Aug. 11, 2021), <https://news.uga.edu/selig-multicultural-economy-report-2021/>.

¹⁰ *Inclusion, Information, and Intersection - The Truth About Connecting with Latinos*, Nielsen 2 (Sept. 30, 2021), <https://www.nielsen.com/wp-content/uploads/sites/3/2021/09/nielsen-2021-hispanic-diverse-insights-report-210682-D9.pdf>.

III. AGENCIES MUST RECOGNIZE DISCRIMINATORY BEHAVIOR TO ADEQUATELY ACKNOWLEDGE MODERN MARKET REALITIES

The neglect of diversity initiatives in merger enforcement guidelines have failed to take into account discriminatory practices and modern market realities. Presumptions concerning market concentration regarding proposed mergers must be reevaluated, focusing on diversity to ensure equitable market shares following the likely enhancement in market power by a merging firm or company. The Agencies must strengthen merger enforcement guidelines to properly assess the impacts of proposed horizontal and vertical mergers on nascent and potential competition from diversely-owned businesses, to preserve diverse products and content to consumers. Additionally, merger enforcement guidelines must adequately assess entry barriers and diversity initiatives to promote innovation and competition through labor markets. This includes digital markets that are rapidly increasing in market power and require an emphasis on diversity metrics to increase competition.

A. Diversity Should Be Part of the Agencies' Evaluation of a Proposed Merger's Competitive Impacts

As presumptions of market concentration can indicate likely competitive effects of a merger, merger enforcement guidelines must consider how diversity affects competitiveness and innovation following the likely enhancement in market power. There are typically three general types of mergers: (1) horizontal mergers between firms or companies that are actual or potential competitors; (2) vertical mergers involving firms or companies in the same supply chain; and (3) mergers involving adjacent or unrelated product markets.¹¹ By considering both the “post-merger level of market concentration and the change in concentration resulting from a merger,” the Agencies seek to foresee most potential harms to relevant markets.¹² However,

¹¹ Clare Y. Cho, Cong. Research Serv., R46739, Mergers and Acquisitions in Digital Markets 1 (Mar. 30, 2021).

¹² Dep't of Justice & FTC, Horizontal Merger Guidelines 18 (Aug. 19, 2010), <https://www.justice.gov/sites/default/files/atr/legacy/2010/08/19/hmg-2010.pdf>.

market share alone does not tell the entire story. By failing to consider diversity, the current merger enforcement guidelines do not fully take into account harms to competition and innovation.

The recent merger between Discovery Inc. (“Discovery”) and WarnerMedia (“Warner”) to create the new Warner Bros. Discovery (WBD) is an example of a merger that will result in significant post-merger market concentration in the relevant multimedia communications markets that produce content as the product to consumers through traditional media and new streaming services. Shortly following the WBD merger approval, the company announced its new Board of Directors (“WBD Board”).¹³ To NHMC’s disappointment, the new WBD Board fails to include Latinx representation, despite Latinx consisting of nearly 20 percent of the U.S. population,¹⁴ and approximately 40 percent of California’s population,¹⁵ where Warner Brothers was initially founded. With a projected increase in Latino buying power to \$2.6 trillion by 2024,¹⁶ WBD’s disregard of Latinx representation at the executive level and board positions is at odds with modern market realities regarding market shares of historically marginalized communities. The current ecosystem of antitrust regulation requires organizations like NHMC to

¹³ Meg James, *Warner Bros. Discovery board of directors draws more criticism for lack of Latinos*, Los Angeles Times, Mar. 15, 2022, <https://www.latimes.com/entertainment-arts/business/story/2022-03-15/warner-bros-discovery-board-diversity-lack-latinos>.

¹⁴ *Race and Ethnicity in the United States: 2010 Census and 2020 Census*, U.S. Census Bureau, (Aug. 12, 2021) <https://www.census.gov/library/visualizations/interactive/race-and-ethnicity-in-the-united-state-2010-and-2020-census.html>; see also Nicholas Jones, Rachel Marks, Roberto Ramirez & Merarys Ríos-Vargas, *Improved Race and Ethnicity Measures Reveal U.S. Population Is Much More Multiracial: 2020 Census Illuminates Racial and Ethnic Composition of the Country*, U.S. Census Bureau (Aug. 12, 2021), <https://www.census.gov/library/stories/2021/08/improved-race-ethnicity-measures-reveal-united-states-population-much-more-multiracial.html>.

¹⁵ Ross Kerber, *In California, Latino boardroom representation lags -study*, Reuters, Sept. 13, 2021, <https://www.reuters.com/business/sustainable-business/california-latino-boardroom-representation-lags-study-2021-09-13/>.

¹⁶ *Inclusion, Information, and Intersection - The Truth About Connecting with Latinos*, Nielsen 2 (Sept. 30, 2021), <https://www.nielsen.com/wp-content/uploads/sites/3/2021/09/nielsen-2021-hispanic-diverse-insights-report-210682-D9.pdf>.

step in and negotiate on behalf of our community with media conglomerates and giants. While altruistic to our organization’s mission, it is a David versus Goliath fight that inherently pits historically and intentionally marginalized people against some of the most powerful corporations in the country.

As a result of this \$43 billion dollar merger, WBD will control Warner, which includes “CNN, Warner Bros., HBO, HBO Max, Turner Sports, TNT, TBS, TCM, Cartoon Network and other media brands.”¹⁷ Additionally, with control of Discovery, the new content giant WBD also controls the “Discovery Channel, Food Network, HGTV, the Science Channel, Animal Planet and many more U.S. and international entertainment media brands.”¹⁸ The size of the new WBD will significantly impact the existing multimedia market due to its substantial concentration of its market share. It’s likely that this would result in the unfortunate consolidation or elimination of diverse content that prior to merger was in competition to one another. For example, if Discovery and Warner each carried Latinx-serving channels, only one would likely continue to exist post-merger.

With HBO, HBO Max, and Discovery+, WBD will have more than 90 million subscribers to their streaming services.¹⁹ While WBD might provide more competition amongst other large streaming services such as Netflix, which “has more than 220 million paying subscribers,” other smaller and more diverse video content competitors might likely be unable to compete in the resulting land of giants. Smaller streaming platforms may have little choice but to

¹⁷Thomas Moore, *AT&T merging WarnerMedia division with Discovery Inc.*, The Hill, May 5, 2021, <https://thehill.com/homenews/media/553826-att-merging-warnermedia-division-with-discovery-inc?rl=1>.

¹⁸ *Id.*

¹⁹John Koblin, *Hollywood Gets a New Giant*, New York Times, April 8, 2022, <https://www.nytimes.com/2022/04/08/business/media/discovery-warner-media.html>

pursue a strategy of binge acquired by one of the. The result would be further consolidation, increased concentration, and reduced diversity, in the video content market.

In accordance with the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (“HSR Act”), companies with significant value that meet filing thresholds must file a premerger notification with the Agencies and wait for a designated period of time for the Agencies to review, identify, and challenge competitively harmful mergers.²⁰ After the investigation, the Agencies can either allow the transaction to proceed unchallenged, enter a consent agreement with the companies, or seek to stop the entire transaction by filing a federal suit.²¹ In the case of the WBD merger, the Department of Justice (“DOJ”) decided not to challenge the merger following the expiration of the waiting period.²² It appears that the DOJ neglected to consider how WBD’s market concentration could lessen competition in diverse content by consolidating such a significant market share of video content in non-diverse hands, reducing the availability of diverse and innovative content to Latinx and other diverse consumer groups in the relevant market.

The RFI inquires as to whether the “inclusion of multiple alternative presumptions [would] better reflect the diversity of transactions and evidence presented by the modern economy.”²³ A 2016 study by El Rey Network demonstrated that diversity has a trickle-down effect in the television industry: diverse production deals lead to diverse showrunners, which leads to diverse writers, which leads to diverse content and representation on screen.²⁴ The El Rey study is an example of how placing emphasis on diversity leads to the inclusion of more

²⁰ Clare Y. Cho, Cong. Research Serv., R46739, Mergers and Acquisitions in Digital Markets 4,5 (Mar. 30, 2021)

²¹ *Id.*

²² Dominick Mastrangelo, *DOJ approves WarnerMedia-Discovery merger*, The Hill, Feb. 9, 2022, <https://thehill.com/homenews/media/593468-doj-approves-warnermedia-discovery-merger/>.

²³ RFI at 5.

²⁴ *State of Diversity in Media & Entertainment*, El Rey Network, Vol. 1, at 25 (rel. Dec. 1, 2016), <https://drive.google.com/file/d/1JY7GbHr5dfRC2YmeAF9Qykqw3UiZrMi2/view?usp=sharing> (El Rey Study).

diverse output better reflects the modern economy and protects against the adverse effects on consumers of having less diverse content choices in relevant markets. The lack of enforceable diversity metrics in merger enforcement guidelines, however, leads to the neglect of diversity initiatives following post-merger, further lessening competition and consumer choices. Oftentimes merging corporations promise additional diversity initiatives as negotiation tactics with civil rights organizations to garner support for their merger, but rarely do these promises manifest into programs that move the needle on diversity—and are almost never enforceable promises via the MOU system.

Mergers that cause a significant increase in market concentration are presumed to enhance market power. A focus on diversity in merger reviews can ameliorate some of the adverse market power effects by promoting more equitable competitive market shares from diverse sources, furthering competition in accordance with Section 7 of the Clayton Act. Therefore, merger enforcement guidelines must prioritize diversity metrics to fully account for the true impact of a proposed merger on market diversity. Incorporating diversity metrics into the Agencies' analysis will preserve the equitable market share—both in ownership, leadership, and content—of historically marginalized businesses and communities that have historically been neglected but which are becoming significant and gradually increasing share of relevant markets.

B. Agencies Should Reevaluate Nascent Competition and Potential Future Competition From Assumed Unrelated Markets

The RFI inquires as to “[w]hat changes in standards or approaches would appropriately strengthen enforcement against mergers that eliminate a potential competitor.”²⁵ Additionally, the Agencies inquire as to how the guidelines should assess the plausible path from a nascent

²⁵ RFI at 6.

competitor to a plausible competitor.²⁶ The acquisition of nascent firms or companies occurs during the acquisition or merging of companies in adjacent or unrelated product markets.²⁷ The products or services may be similar but clearly would not be considered the same product.²⁸ This has become an issue of increasing concern in the big tech industry and other multimedia consolidation because the acquisition of nascent competition is becoming a means for dominant companies to acquire nascent competitors before they can become actual competitors. This form of consolidation harms diversity and lessens competition and innovation, resulting in modern-day monopolies. The Agencies should change the merger enforcement guidelines to adequately address how the acquisition by dominant firms of nascent competitors in seemingly unrelated markets leads to a lack of diversity and suppression of innovation.

Competitive harm from certain mergers and acquisitions can adversely affect consumers through a substantial lessening of competition. As the acquisition of nascent firms tends to consume the small market share of small firms, which are usually more culturally diverse, the acquisition by the larger firm tends to lessen alternative thought that prospers in culturally diverse markets. Thus, limiting innovation and improvements in services or products.

On August 22, 2012, the Federal Trade Commission (“FTC”) reviewed and closed its investigation of the proposed acquisition by Facebook of Instagram for \$1 billion without taking any action.²⁹ By December 9, 2020, however, the FTC had filed a lawsuit against Facebook, alleging that the company maintained its monopoly by buying companies, such as Instagram and WhatsApp, that present future competitive threats.³⁰ A monopoly occurs when a defendant

²⁶ *Id.*

²⁷ Clare Y. Cho, Cong. Research Serv., R46739, Mergers and Acquisitions in Digital Markets 3 (Mar. 30, 2021)

²⁸ *Id.*

²⁹ Clare Y. Cho, Cong. Research Serv., R46739, Mergers and Acquisitions in Digital Markets 11 (Mar. 30, 2021)

³⁰ *Id.*

attains a significant market share to establish a monopoly power.³¹ The FTC alleged that Facebook had a monopoly based on its market share in excess of 60 percent.³² This is a clear example of eliminating a potential competitor in the foreseeable relevant market by preemptively acquiring a smaller nascent competitor. Indeed, in an internal email sent seven months prior to Facebook’s acquisition of Instagram, Facebook CEO Mark Zuckerberg said that “Instagram has become a large and viable competitor to us on mobile photos, which will increasingly be the future of photos.”³³

While it is difficult to ascertain precisely whether Instagram would have attained sufficient market share to be a competitor to Facebook, Instagram grew in market share as a result of the merger. Through the use of Facebook’s resources, Instagram grew from 100 million monthly active users (“MAUs”) in 2013 to 500 million by 2016 and 1 billion by 2018.³⁴ By 2020, Instagram generated an estimated \$24 billion in revenue consisting of 36.9 percent of Facebook’s total revenue.³⁵ The Facebook/Instagram example proves that, to properly account for how competition may develop from unexpected sources, the Agencies must consider how competition from unrelated markets or nascent firms may develop on its own given modern markets.

By emphasizing the importance of preserving diversity at all levels of relevant markets, the Agencies will be better suited to maintain market competition throughout the merger of even assumed unrelated competitors. Therefore, merger enforcement guidelines should include

³¹ Jay B. Sykes, Cong. Research Serv., LSB10575, *The Facebook Antitrust Lawsuits and the Future of Merger Enforcement 3* (Feb. 16, 2021)

³² *Id.*

³³ First Amended Complaint for Injunctive and Other Equitable Relief at 27, *FTC v. Facebook, Inc.*, case no. 1:20-cv-03590 (D.C. Cir. Dec. 9, 2020).

³⁴ Mansoor Iqbal, *Instagram Revenue and Usage Statistics (2022)*, Business of Apps (Jan. 19, 2022), <https://www.businessofapps.com/data/instagram-statistics/#1>.

³⁵ *Id.*

meaningful mechanisms to enforce diversity metrics throughout the Agency review process and post-merger.

C. Agencies Should Reevaluate How a Lack of Diversity Considerations Harm Labor Markets and Innovation

The RFI inquiries as to whether the current merger enforcement guidelines sufficiently analyze mergers that “may lessen competition in labor markets and thereby harm workers.”³⁶ Failure to adequately consider diversity initiatives during the review of proposed mergers and acquisitions harms competition in the labor market. To promote competition, the Agencies must update merger enforcement guidelines to better enforce diversity initiatives as merger conditions, and remove entry barriers to diverse representation and competition in modern labor markets.

The industry's lack of focus and commitment to diversify its labor force and remove entry barriers to include the Latinx community at influential levels has only hampered competitive markets and the protection of workers and consumers. Important decisions are always made at the boardroom and executive levels. Therefore, ensuring diverse representation in staff and leadership positions ensures the exchange of different ideas to develop innovative options to serve a more diverse consumer base and market.

Diversity in the boardroom enables innovation and increases profits, as companies that fail to promote diversity are less likely to achieve above-average profitability. According to a 2018 study, companies that fostered ethnically diverse executive teams were 33 percent more likely to outperform their peers on profitability.³⁷ However, despite the impacts on profitability and markets, “just under one in four new S&P 500 directors are minorities.”³⁸

³⁶ RFI at 7.

³⁷ Vivian Hunt, Lareina Yee, Sara Prince & Sundiatu Dixon-Fyle, *Delivering Through Diversity*, McKinsey & Company (Jan. 18, 2018), <https://www.mckinsey.com/business-functions/people-and-organizational-performance/our-insights/delivering-through-diversity>

³⁸ Seema Mody, *Diversity drives profits, but it is still lacking in the board room*, CNBC, Jun. 12, 2020, <https://www.cnbc.com/2020/06/12/diversity-drives-profits-but-it-is-still-lacking-in-the-board-room.html>

When diversity metrics are disregarded or unenforced, large firms acquiring smaller minority-owned firms tend to disregard or eliminate diverse content or the racial/ethnic minority workforce following an acquisition. Unfortunately, this has led to a lack of diversity in broadcast ownership, resulting in the suppression of unique or innovative content. According to the Federal Communications Commission’s *Fifth Report on Ownership of Broadcast Stations*, women only held a majority ownership interest in merely 8 percent of commercial broadcast stations in 2019, while Latinos only held majority ownership in only 6 percent of stations, and other communities of color only held majority ownership in only 4 percent of stations.³⁹ When it comes to majority ownership interest of non-commercial broadcast stations in 2019, women held a majority interest in only 12 percent of stations, while Latinx and other communities of color held majority ownership in only 3 percent of those stations.⁴⁰

Additionally, presumptions of Latinx as a monolith group fail to account for our communities’ unique cultures and perspectives, which leads to negative or outdated stereotypes. A recent report by the U.S. Government Accountability Office (GAO) demonstrated that compared to the representation in the rest of the workforce, the Latinx community is underrepresented in the media industry.⁴¹ In 2019, Latinx only made up an estimated 12 percent of workers in the media industry, including film, television, publishing, and news.⁴² In California, the Latinx community consists of approximately 40 percent of the population, making

³⁹ Fifth Report on Ownership of Broadcast Stations, FCC Form 323 and Form 323-E Ownership Data as of October 1, 2019 (MB 2021), <https://www.fcc.gov/biennial-forms-323-and-323-e-broadcast-ownership-data-and-reports> (“Fifth 323 and 323-E Report”).

⁴⁰ Fifth 323 and 323-E Report at 3.

⁴¹ U.S. Gov’t Accountability Office, GAO-21-105322, *Workforce Diversity: Analysis of Federal Data Shows Hispanics Are Underrepresented in the Media Industry* (Sept. 21, 2021), <https://www.gao.gov/assets/gao-21-105322.pdf> (“GAO Hispanics Report”).

⁴² GAO Hispanics Report at 3.

the Latinx community the largest ethnic group in the state.⁴³ Yet our community remains sadly overlooked despite our contributions to labor markets and relevant market shares.

D. Agencies Should Reevaluate How Entry Barriers Substantially Lessen Competition

The RFI inquires as to whether the current merger enforcement adequately analyze how entry barriers harm competition.⁴⁴As the current WBD merger proceeds, concerns about the diversity of the labor market and workforce are becoming more credible. The RFI inquires as to how “wages, salaries, and other financial compensation of workers’ terms and conditions of employment” should be considered in merger enforcement guidelines, in particular as it relates to “job characteristics, geography, and worker flows.”⁴⁵ The WBD merger is an example of how market concentration and enhancement in market power doesn’t necessarily impact the labor market favorably in terms of diversity. With WBD assuming \$55 billion in debt, it has “vowed to find \$3 billion worth of savings between the two companies,” resulting in likely layoffs, “particularly for overlapping business functions.”⁴⁶As WBD transitions its headquarters to Los Angeles from New York, we see the inevitable risks to those in overlapping functions. WBD has already overhauled Warner’s leadership, as well as several “corporate officers in charge of communications, revenue, human resources, technology, legal, and finance.”⁴⁷

As historically and intentionally marginalized communities, such as Latinx, have been neglected in the media industry and make up a lower percentage of workers than in any other

⁴³ Ross Kerber, *In California, Latino boardroom representation lags -study*, Reuters, Sept. 13, 2021, <https://www.reuters.com/business/sustainable-business/california-latino-boardroom-representation-lags-study-2021-09-13/>

⁴⁴ *Id.* at 9.

⁴⁵ RFI at 7

⁴⁶ John Koblin, *Hollywood Gets a New Giant*, New York Times, April 8, 2022, <https://www.nytimes.com/2022/04/08/business/media/discovery-warner-media.html>

⁴⁷ *Id.*

industry, the urgency to maintain a culturally diverse workforce and labor market following proposed mergers is essential. At the senior and executive management level, Latinx representation only makes up 4 percent of the labor force, while professionals like actors, producers, writers, and directors only consist of 8 percent of workers.⁴⁸ Lamentably, the largest Latinx representation in the media industry are service workers consisting of 22 percent of workers.⁴⁹ Mergers and acquisitions such as WMD will likely result in a reduction in the size of the workforce and potential wages of its employee workforce to meet debt obligations and reduce overlapping functions. Given that representation of the Latinx community within the media industry is lagging, the likely reduction of workers in the labor market will likely have a disproportionately adverse impact on our community. Therefore, merger enforcement guidelines must be updated to address the negative impacts that market consolidation can have on labor markets when a lack of a diverse workforce leads to a lack of innovation and lessening of competition.

On November 2, 2021, the DOJ filed a civil antitrust lawsuit to block the proposal by Penguin Random House (“Penguin”) to acquire Simon & Schuster (“S&S”).⁵⁰ The DOJ claimed the merger would “exert influence over which books are published in the United States and how much authors are paid for their work.”⁵¹ Penguin is already the largest book publisher in the world, and the acquisition of S&S would put Penguin in control of close to half the market for acquiring publishing rights to anticipated top-selling books.⁵² This will likely leave hundreds of individual authors with fewer publisher options and less leverage, resulting in an increase in

⁴⁸ GAO Hispanics Report at 7.

⁴⁹ *Id.*

⁵⁰ Christie D’Zurilla & Tali Arbel, *U.S. files antitrust suit to stop major book publisher merger*, Los Angeles Times, Nov. 2, 2021,

<https://www.latimes.com/world-nation/story/2021-11-02/us-files-antitrust-suit-to-stop-major-book-publisher-merger>

⁵¹ *Id.*

⁵² *Id.*

monopsony power. Monopsony power refers to an enhancement in market power by a buyer, and “Agencies conclude that a merger of competing buyers is likely to lessen competition in a manner harmful to sellers.”⁵³

The proposed acquisition of S&S demonstrates how a potential merger could enhance and consolidate monopsony power to such a degree that decreases in readers’ choices of stories and authors are likely, resulting in a lessening competition and harming consumers in the relevant market. The consolidation in market power would likely increase entry barriers to publishing and writing by historically marginalized communities, such as Latinx, leading to a reduction in the diversity of the publishing workforce and the output of publishers. Furthermore, as the most successful novelizations transition to different mediums such as film and television, the lack of diversity by publishers would likely harm the competitiveness and diversity of those markets as well.

To prevent an anticompetitive market, diversity and cultural relevance must be a priority in updated guidelines to identify entry barriers and promote growth. Impediments to diverse rivalry lead to a consolidation of market power, decreasing innovation that harms competition. The Agencies must ensure that Latinx and other communities of color have representation with authority to greenlight projects to ensure diverse and culturally relevant content and viewpoints. Therefore, NHMC urges the Agencies to update merger enforcement guidelines to prioritize the retention of, and increase in, the diversity of talent and workforce from racial and ethnic minorities by removing entry barriers to ensure innovation and competition throughout labor markets.

⁵³ Dep’t of Justice & FTC, Horizontal Merger Guidelines 33 (Aug. 19, 2010), <https://www.justice.gov/sites/default/files/atr/legacy/2010/08/19/hmg-2010.pdf>.

E. Agencies Should Reevaluate How To Consider Mergers In Digital Markets.

The RFI inquires as to how mergers in digital markets “differ[] from mergers in other markets.”⁵⁴ The Agencies also seek to assess the best means to define how relevant markets address the rapid and ever-evolving change in the digital sector.⁵⁵ “Firms in digital markets may face incentives to merge with a firm in an adjacent or unrelated product market.”⁵⁶ An example of this issue can be found in Google’s acquisition of Fitbit on January 14, 2021.

Google is a technology company that has primarily focused its business around its search engine and software, artificial intelligence, and online advertisements. Prior to acquiring Fitbit for approximately \$2.1 billion, Google did not have the means to create its own smartwatches.⁵⁷ Fitbit’s compatibility with Google’s Android and Apple’s iOS devices allows users the ability to receive calls, texts, and other alerts.⁵⁸ This has allowed Google to better compete with Apple, which had over 50 percent of the global revenue from smartwatch shipments in the first half of 2020.⁵⁹ This demonstrates the fluidity of digital markets venturing outside their established markets to acquire unrelated or nascent competition to prevent market consolidation of new innovations.

The RFI further inquires as to how the Agencies should analyze mergers involving the aggregation of data.⁶⁰ The Google acquisition of Fitbit demonstrates how the collection of relevant health, location, and other data can be used to either solicit online advertisements or refine algorithms.⁶¹ That gives Google a competitive advantage among other software providers in the industry and relevant markets.

⁵⁴ RFI at 7.

⁵⁵ *Id.*

⁵⁶ Clare Y. Cho, Cong. Research Serv., R46739, Mergers and Acquisitions in Digital Markets 11 (Mar. 30, 2021)

⁵⁷ *Id.* at 13.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ RFI at 8.

⁶¹ Clare Y. Cho, Cong. Research Serv., R46739, Mergers and Acquisitions in Digital Markets 15 (Mar. 30, 2021).

As digital markets rise, merger enforcement guidelines should analyze and establish metrics on how mergers and acquisitions in digital markets use data aggregation to target vulnerable communities negatively. Online data collection has led to discriminatory advertising practices that have harmed minority communities such as Latinx. Several of these deceptive practices are committed by payday loans companies that target Latinx and communities of color online, trapping them in a cycle of high-interest debt. For example, a study in Houston found that payday and title-lending websites featured Latinos in more than 30 percent of their pictures, even though Latinos make up less than 20% of their customers in Texas.⁶² In stark contrast, nearly 75% of the ads of mainstream banks did not feature a single picture of a Latino individual.⁶³

Therefore, the Agencies must reform merger enforcement guidelines for digital markets to acknowledge how the increased demographic diversification of consumers and products impacts historically and intentionally marginalized communities, such as Latinx. Agencies must carefully review and analyze, and where necessary, enjoin or condition proposed mergers to ensure that they do not diminish competitive diversity in product and labor markets.

IV. CONCLUSION

In order to be in compliance with the Clayton Act, the Agencies must update the merger enforcement guidelines to include and prioritize diversity metrics to promote growth and market competition through diverse content and a diverse labor market. In addition, the Agencies should reconsider and acknowledge the shortcomings in how the implications of the age and discriminatory nature of the origins of the merger guidelines, including the Clayton Act of 1914 has been enforced over the decades and prevent, and how those implications further

⁶² David Lazarus, *Column: There's a racial gap in marketing by banks and payday lenders, study finds*, Los Angeles Times, Apr. 9, 2021, <https://www.latimes.com/business/story/2021-04-09/racist-marketing-banks-payday-lenders>.

⁶³ *Id.*

discriminatory effects on against on historically and intentionally marginalized people, like the Latinx community. The Agencies should not approve mergers between companies that lack diversity initiatives. Instead, the Agencies should go beyond analyzing whether or not the merger would lessen competition to avoid further discriminatory and exclusionary practices. Therefore, NHMC urges the Agencies to reform their merger enforcement guidelines to capture the diversity-related competitive issues currently raised by mergers, focusing on how increasing diversity initiatives and metrics are necessary to adequately preserve and promote market competition and innovation.